

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TUAN PHUONG NGUYEN,

Defendant and Appellant.

G036837

(Super. Ct. No. 05CF1163)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

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Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110(a), this opinion is certified for publication with the exception of the part titled, “*Consecutive Sentencing Did Not Violate Defendant’s Right to a Jury Trial.*”

Defendant Tuan Phuong Nguyen contends the court applied the wrong standard to his posttrial *Pitchess* motion.<sup>1</sup> Defendant had filed the motion after his bribery conviction to gather evidence for a new trial motion, in which he would assert ineffective assistance of counsel. The court denied the motion. It found the requested police personnel records were immaterial to the new trial motion because they did not support an ineffective assistance claim. Defendant contends the court should have disclosed the requested records because they were material to his defense at trial.

The court did not err. By statute, a *Pitchess* motion compels disclosure of police personnel records only if they are material to the pending litigation. Because defendant had already been convicted, the pending litigation was his new trial motion. Thus, the court correctly considered whether the requested records were material to his ineffective assistance claim. The court did not abuse its discretion by concluding the requested records were immaterial to this claim.

In a supplemental brief, defendant contends the court violated his right to a jury trial by imposing consecutive sentences based on facts not found by a jury. Not so. Consecutive sentencing may be imposed based on facts found by the court, without implicating defendant's right to a jury trial. We affirm.

## FACTS

Santa Ana police detectives Lima and Tolosa had been investigating ongoing prostitution at defendant's tanning salon. Defendant gave the officers two envelopes each containing \$500 in cash. He promised, "Next time it will be better." The detectives booked the cash into evidence and reported it to the Orange County District Attorney's Office. They returned to the tanning salon twice more, each time receiving

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<sup>1</sup> (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).)

cash from defendant. Defendant also asked the officers to scare away a competing prostitution ring. Eventually, the police officers arrested defendant.

The district attorney filed an information charging defendant with six counts of bribing an executive officer. (Pen. Code, § 67.) The detectives testified at trial. The prosecution played recordings of their conversations with defendant. A district attorney's office investigator testified defendant had reported bribing Detective Lima. Defendant called no witnesses. Instead, defense counsel cross-examined the prosecution's witnesses in an attempt to show entrapment.

The jury found defendant guilty on all counts. The court sentenced defendant to a total term of five years in state prison. It imposed a midterm of three years on count one, plus two consecutive one-year sentences (one-third the midterm) for counts three and five. It stayed sentencing on counts two, four, and six. (Pen. Code, § 654.)

Defendant retained new counsel, who filed a *Pitchess* motion to discover the detectives' personnel records. Defense counsel sought the records to support a new trial motion, in which she intended to claim ineffective assistance of counsel. Specifically, she claimed trial counsel had unreasonably failed to file an earlier *Pitchess* motion to gather evidence to impeach the detectives. The court agreed to review the detectives' personnel records for evidence they had solicited bribes, made false arrests, submitted false police reports, or committed perjury. After reviewing the records, the court stated, "There is no discoverable material contained in Officer Tolosa's personnel file. As to Officer Lima, there is nothing contained in that file that would lead the court to believe that [defendant] has not received a fair trial. There is nothing to disclose."

Defense counsel later filed a new trial motion, claiming the court should have disclosed Detective Lima's personnel records. The court noted the records did not support defendant's ineffective assistance claim, even though they would have been responsive to an earlier *Pitchess* motion. The court stated, "I did find that there was material that would have been disclosed prior to trial, but looking back in retrospect after

trial, it's the court's conclusion that that evidence was of such little probative value that number one, it probably would not have been admitted to begin with, but second of all, it would not have made a difference in the outcome of this trial. It would not have raised a reasonable doubt concerning that particular officer's testimony." The court denied the motion, and sentenced defendant to a total term of five years in state prison.

## DISCUSSION

### *The Court Correctly Denied Defendant's Pitchess Motion*

In *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, the court "established that a criminal defendant could 'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him. [¶] In 1978, the California Legislature codified the holding of *Pitchess* by enacting Penal Code sections 832.7 and 832.8, as well as Evidence Code sections 1043 through 1045. [Citations.] To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019.)

Defendant notes the "relatively low threshold for discovery" pursuant to a *Pitchess* motion. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.) As he states, "[a]ll the law requires to show good cause to permit such discovery is the 'materiality' of the information to the subject matter of the pending litigation . . . ." (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392; accord Evid. Code, § 1043, subd. (b)(3) [*Pitchess* motion requires an affidavit "setting forth the materiality [of the requested personnel records] to the subject matter involved in the pending litigation"].)

The issue is what constitutes the “pending litigation” to which Detective Lima’s personnel records must be material. Defendant contends the court erred by requiring him to show the requested records were material to his new trial motion. Rather, he asserts he needed to show only that the records were material — as the court conceded — to his defense of the underlying prosecution.

A recent decision has construed the phrase, “pending litigation,” in a similar context. In *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100 (*Hurd*), the defendant filed a posttrial *Pitchess* motion to gather support for a habeas corpus petition. (*Hurd*, at p. 1105.) The court held Penal Code section 1054.9, which allows for pre-habeas corpus discovery, authorized the motion. (*Hurd*, at p. 1108.) But it required defendant to show the requested records were material to his habeas corpus petition, not his defense to the underlying prosecution. (*Id.* at p. 1105.) The court noted a *Pitchess* motion must ““set[] forth the materiality [of the desired personnel records] to the *subject matter involved in the pending litigation . . .*”” (*Hurd*, at p. 1110.)

The *Hurd* court concluded, “We deem the litigation to which the discovery must be material within the meaning of [Evidence Code] section 1043 to be the habeas corpus proceeding that has been or will be initiated by petitioner’s habeas corpus petition. We deem the scope of the *Pitchess* discovery available under [Penal Code] section 1054.9 to be that justified by such current materiality to claims cognizable on habeas corpus.” (*Hurd, supra*, 144 Cal.App.4th at p. 1111.) The court held the defendant was not entitled to discovery because the desired personnel records were immaterial to his posttrial claims, which themselves were not even cognizable on habeas corpus. (*Id.* at pp. 1112-1114.)

*Hurd’s* conclusion applies with equal force here. After defendant was convicted, the “pending litigation” to which the requested records had to be material was his new trial motion claiming ineffective assistance. (*Hurd, supra*, 144 Cal.App.4th at p. 1111; accord Evid. Code, § 1043.) To prevail on this claim, defendant would have to

show a “reasonable probability” that competent performance would have led to a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) Thus, the proper standard for reviewing defendant’s posttrial *Pitchess* motion was whether a reasonable probability existed that disclosure of the requested records would have led to a different result at trial.

The court applied this correct standard. It denied defendant’s motion because the requested records were likely inadmissible and “would not have made a difference in the outcome of this trial.” Contrary to defendant’s claim, the court correctly reviewed his posttrial *Pitchess* motion through the lens of his new trial motion claiming ineffective assistance — this was the only litigation pending at the time.

Because the court applied the correct standard, the next issue is whether it applied the standard correctly. Defendant bears the burden of showing the court abused its discretion by denying his posttrial *Pitchess* motion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226, 1228.) He did not provide us with the requested personnel records. On the existing record, defendant has not shown the court abused its discretion by concluding disclosure of the records would not have led to a different result at trial.

#### *Consecutive Sentencing Did Not Violate Defendant’s Right to a Jury Trial*

We allowed defendant to file a supplemental brief addressing the United States Supreme Court’s decision in *Cunningham v. California* (2007) \_\_\_ U.S. \_\_\_ [127 S.Ct 856 ] (*Cunningham*). Defendant contends *Cunningham* precluded the court from imposing consecutive sentences based on its own finding that his crimes were “committed at different times . . . , rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.” (Cal. Rules of Court, rule

4.425(a)(3).) Defendant asserts his Sixth Amendment right to a jury trial entitled him to a jury determination of the factual basis for imposing consecutive sentences.<sup>2</sup>

To start, it is unclear whether the decision to impose consecutive sentences here involved judicial factfinding at all. In their verdicts on counts 1, 3, and 5 — the counts for which the court imposed consecutive sentences — the jury found defendant guilty of the offenses “as charged in [the counts] of the amended [i]nformation.” In counts 1, 3, and 5 of the amended information, the People alleged defendant bribed a detective “[o]n or about November 16, 2004,” “[o]n or about December 07, 2004,” and “[o]n or about January 25, 2005.” Thus, the verdicts strongly suggest the defendant committed the crimes at different times.

Even if the court engaged in some judicial factfinding here, *Cunningham* simply does not call into question our consecutive sentencing rules. Imposing consecutive sentences for multiple offenses does not increase a defendant’s punishment beyond the statutory maximum *for each offense*. Here, the prescribed statutory maximum penalty for the offense of bribing an executive officer is the midterm, three years in state prison. (Pen. Code, § 67.) Defendant committed six such offenses. The court sentenced him to three years on one count, consecutive one-year terms on two other counts, and stayed sentencing on the last three counts. By imposing consecutive sentences, the court merely directed the *manner* in which defendant would serve the “no more than the statutory maximum” sentences for three of his offenses. It did not increase the penalty for any one of defendant’s offenses beyond the three-year statutory maximum.

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<sup>2</sup> Defendant did not forfeit this issue by failing to object below. A defendant may raise his deprivation of fundamental constitutional rights, such as the right to a jury trial, for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) Moreover, *Cunningham* was decided while this appeal was pending, well after defendant’s sentencing.

Defendant cannot point to any offense for which the court imposed more than the statutory maximum.

Our conclusion is consistent with prevailing Sixth Amendment jurisprudence. Courts across the country routinely uphold consecutive sentencing against Sixth Amendment claims. “[T]he vast majority of courts that have considered this question in the wake of *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*)] and *Blakely* [*v. Washington* (2004) 542 U.S. 296 (*Blakely*)] have reached the conclusion that judicial factfinding in support of consecutive sentences does not violate the Sixth Amendment. [W]e agree with that proposition.” (*State v. Tanner* (Or.Ct.App. 2006) 150 P.3d 31, 34.)<sup>3</sup>

Accordingly, we conclude a court’s decision to impose consecutive sentences, even if it requires judicial factfinding, does not violate a defendant’s right to a jury trial. We reject defendant’s *Cunningham* claim.

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<sup>3</sup> (See, e.g., *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 686 [“There is no constitutional problem with consecutive sentencing so long as the trial court does not exceed the combined statutory maximums”]; *State v. Cubias* (Wash. 2005) 120 P.3d 929, 932 [“we are convinced that consecutive sentences do not violate *Blakely*”]; *State v. Abdullah* (N.J. 2005) 878 A.2d 746, 756-57 [“consecutive sentences do not invoke the same concerns that troubled the Supreme Court in *Apprendi* [and] *Blakely*”]; *State v. Senske* (Minn.Ct.App. 2005) 692 N.W.2d 743, 749 [“Consecutive sentencing involves separate punishments for discrete crimes . . . , there is no basis to apply *Blakely* to consecutive sentences”].)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.